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# RELEASING THE LOCKERBIE BOMBER: NATIONAL INTERESTS, INTERGOVERNMENTAL RELATIONS AND PARA-DIPLOMACY

Daniel Kenealy<sup>1</sup>

## Abstract

In his recent book *The Lockerbie Bombing: The Search for Justice*, Kenny MacAskill recounts his decision to release Abdelbaset Al-Megrahi, the only man convicted of the Lockerbie bombing. Eight years have passed since Al-Megrahi's release on compassionate grounds. In the book MacAskill ranges far beyond the events in which he was closely involved, recounting the bombing itself, the subsequent investigation, trial and appeals in an effort to offer a comprehensive account of the Lockerbie bombing. In this article I review the book and return to some of the key issues raised by MacAskill's decision and the broader context in which it was made. I argue that the book sheds little new light on Lockerbie and that it falls short in precisely the areas where MacAskill might have the most insight to offer. It is a rather bloodless and legalistic account that renders the complexities and the shades of grey of international politics in black and white. The case will nevertheless remain fascinating to scholars of intergovernmental relations in the UK, of para-diplomacy, and of international politics.

**Keywords:** Scottish government; devolution; intergovernmental relations; Lockerbie; Kenny MacAskill; para-diplomacy; international politics.

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<sup>1</sup> Lecturer in Social Policy  
School of Social and Political Science  
University of Edinburgh  
Email: [Daniel.Kenealy@ed.ac.uk](mailto:Daniel.Kenealy@ed.ac.uk)

## 1. Introduction<sup>2</sup>

On 20 August 2009 Kenny MacAskill put Scotland at the centre of the world's attention when he announced his decision to release Abdelbaset al-Megrahi – the only person convicted of the bombing of Pan-Am flight 103 over Lockerbie on 21 December 1998 – from Greenock prison. MacAskill, then Cabinet Secretary for Justice in the Scottish Government, reached his decision on compassionate grounds as permitted in Scots law. Al-Megrahi had been diagnosed with terminal prostate cancer and a clinical assessment concluded that a three-month prognosis was 'now a reasonable estimate'.<sup>3</sup> On the day of the announcement, MacAskill ran through his statement one final time and then walked from his office to the media centre at St Andrews House (*The Lockerbie Bombing* (hereinafter *TLB*), p. 243). Before the assembled reporters and cameras he delivered a statement beamed across the world.

Mr al-Megrahi now faces a sentence imposed by a higher power. It is one that no court, in any jurisdiction, in any land, could revoke or overrule. It is terminal, final and irrevocable. He is going to die. In Scotland, we are a people who pride ourselves on our humanity. It is viewed as a defining characteristic of Scotland and the Scottish people ... Our justice system demands that judgment be imposed but compassion be available. Our beliefs dictate that justice be served, but mercy be shown ... For these reasons – and these reasons alone – it is my decision that Mr Abdelbaset Ali Mohmed al-Megrahi, convicted in 2001 for the Lockerbie bombing, now terminally ill with prostate cancer, be released on compassionate grounds and allowed to return to Libya to die (Scottish Government, 2009).

The decision was controversial. Leaders of various faith communities, including Cardinal Keith O'Brien – at the time the Archbishop of St Andrews and Edinburgh – and Nelson Mandela voiced support for MacAskill's decision. But, in the immediate

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<sup>2</sup> All government documents referenced have been published by the UK Ministry of Justice (*MoJ*), the UK Foreign and Commonwealth Office (*FCO*), the UK Cabinet Office (*CO*), or the Scottish Government (*SG*). They are referenced by italics *MoJ*, *FCO*, *CO* or *SG*.

<sup>3</sup> Annex 2: Application for early release on compassionate grounds (Medical), 10 August 2009, *SG*.

aftermath of the decision, voices of opposition dominated, with MacAskill facing criticism both at home and abroad. The initial response from US political leaders was unfavourable, perhaps unsurprisingly given that 189 of the 270 victims were US citizens (*Guardian*, 2009). Closer to home, opposition parties in the Scottish Parliament heaped criticism onto MacAskill (Scottish Parliament, 2009a; 2009b) and the Scottish public was divided (*Channel 4 News*, 2009).

In the years since, the UK and Scottish governments have released a significant amount of official documentation, with fragments appearing courtesy of WikiLeaks. David Cameron ordered an inquiry by the then Cabinet Secretary, Sir Gus O'Donnell, into the events surrounding the decision (UK Government, 2011). Al-Megrahi died not within three months of his release, but nearly three years later in Tripoli. Questions continue to be asked about the bombing, the trial of Al-Megrahi and the evidence that led to his conviction, and who, ultimately, was responsible for ordering the bombing of the plane. In July 2017 Al-Megrahi's family lodged a fresh appeal in an attempt to clear his name (*BBC*, 2017). The case will not go away. And nor should it. Whilst this article does not intend to probe the various theories, claims, and counter-claims about who ultimately was responsible and what role Al-Megrahi had in the events, significant questions and significant doubt still hang over the history of Lockerbie.

The prompt for this article is MacAskill's book, published in May 2016. The book is an in-depth account by the now retired MSP of his decision to release Al-Megrahi. But it goes beyond that, exploring events leading to the bombing, the subsequent investigation, trial and appeal, and the relationship between the West and Libya. This article is intended as a critical review of MacAskill's book and draws on earlier research (Kenealy 2012a; 2012b). The overarching argument is that MacAskill fails to shed much new light on the events surrounding Lockerbie. Furthermore, it is about those events that he is uniquely placed to comment on that he is most cautious, offering little beyond what he made clear at the time in his statements and media appearances. When stepping back to consider the arena of international politics on which the Lockerbie drama played out, MacAskill offers an overly black-and-white, legalistic and moralistic analysis devoid of any nuanced discussion about the type of hard choices that define that arena.

I first place the events surrounding MacAskill's decision (beginning in June 2007 and ending on 20 August 2009) in historical context. I then present an overview of MacAskill's central thesis and core arguments. Focusing in one some specific aspects of the case I then consider it as a case of intergovernmental relations (IGR) in the devolved UK. Following that I consider the position that the Scottish Government found itself in from late 2008 until the announcement of Al-Megrahi's release, arguing that this is the point where MacAskill offers the least insight where he might have offered the most. I argue that the decision to release Al-Megrahi on compassionate grounds can be understood as an example of para-diplomacy.

## **2. The Road to 2007**

I am principally concerned in this article with the events between June 2007 and August 2009, when the UK, Scottish, Libyan and US governments were intertwined in a complicated diplomatic process. However, to understand those events some context is necessary. Table 1 presents a chronology of the key events pertaining to Lockerbie. It is a lengthy table but necessarily so.

[TABLE 1]

Pam-Am flight 103 exploded over Lockerbie on the night of 21 December 1988. The Boeing 747 was en route from London to New York's JFK airport. A bomb planted in the baggage compartment brought down the aircraft. Just less than three years later, and following a protracted investigation, two Libyans – Al-Megrahi and Al Amin Khalifa Fhimah – were indicted. Libya continued to deny involvement or knowledge of the bombing.<sup>4</sup> For nearly seven years efforts were underway to secure the extradition of the two suspects. Negotiations were also required to agree a format and a location for any subsequent trial. In the meantime Libya felt the pressure of UN Security Council resolutions 748 and 883, which placed various

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<sup>4</sup> Letter from the Permanent Rep. of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary- General, 17 November 1991, at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/46/660](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/46/660).

sanctions on Libya, its regime, assets, and officials, particularly inhibiting Libya's oil sector.

By August 1998 agreement had been reached to try the suspects at Camp Zeist, in the Netherlands, under Scottish law. The UK and the US had agreed to this and lodged a letter with the UN on 24 August 1998 stating that 'if found guilty, the two accused will serve their sentence in the United Kingdom', a letter that was to take on much significance as MacAskill deliberated in 2008-2009.<sup>5</sup> UN Security Council resolution 1192 took 'regard' of that letter and established the international basis of the trial, which began on 3 May 2000. The three judges – there was no jury – hearing the case delivered a verdict on 31 January 2001: Al-Megrahi was found guilty and Fhimah not guilty. Al-Megrahi appealed the decision in February 2001 and on 14 March 2002 a five-judge panel upheld the original verdict. In August 2003 the Libyan government agreed to pay compensation to the families of the Lockerbie victims after which further moves were made to lift the UN sanctions.

The case refused to go away and in September 2003 the Scottish Criminal Case Review Commission<sup>6</sup> (SCCRC) began their review of Megrahi's conviction finding, in June 2007, that there were grounds to consider the original court judgement. Specifically, the SCCRC (2007) raised questions about the testimony of Tony Gauci, a clothes shop proprietor in Malta who identified Al-Megrahi as the man who bought the clothes in which the bomb that brought Pam-Am flight 103 down were concealed.<sup>7</sup> The Court of Criminal Appeal decided to proceed with the appeal with a start date set for April 2009.

In parallel to these legal developments, a process of rehabilitating Libya and bringing it back into the fold of international society was underway. In part, Gaddafi

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<sup>5</sup> Letter from the Acting Permanent Reps. of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/1998/795, 24 August 1998, at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/1998/795](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1998/795).

<sup>6</sup> The SCCRC is an independent, public body established in 1999 to review alleged miscarriages of justice in Scotland. It can refer to the High Court of Justiciary any conviction or sentence whether or not an appeal has been previously heard. Section 194C of the Criminal Procedure (Scotland) Act 1995 states that the SCCRC may refer a case where it believes that '(a) a miscarriage of justice may have occurred; and (b) it is in the interests of justice that a reference should be made'.

<sup>7</sup> The suitcase containing the bomb that brought down Pan-Am 103 originated in Malta, according to the best evidence. It was transported from Malta to Frankfurt on an Air Malta flight and then placed, along with other unaccompanied baggage, in a container and on to the first leg of Pam Am 103, from Frankfurt to Heathrow and then transferred to the transatlantic leg of the flight, from Heathrow to JFK.

himself drove that process: with sanctions taking their toll on Libya, he saw a need to re-engage with the West (Suskind, 2003). Turning over Al-Megrahi and Fhimah was part of that process, even though it brought risks for Gaddafi on the home front, given that Al-Megrahi was a prominent member of the Megarha tribe on whose support Gaddafi depended to maintain order in Libya (Porter, 2010, p. 3).

Baker (2013, pp. 262-63) documents how George W. Bush and Tony Blair pursued Gaddafi's offer of renouncing his weapons and missile programmes and becoming an ally of the West in the post-9/11 Global War on Terror. For both the Bush and Blair administrations, Gaddafi's coming in from the cold was 'an important victory ... because it took a potentially erratic nuclear player off the board' and offered the two leaders a good PR story in the aftermath of the invasion of Iraq (*Ibid.*, pp. 301-2). As the relationship between Libya and the West started to thaw, a race began amongst Western governments and companies to secure access to Libya and various trade and commercial concessions (Kenealy 2012b, pp. 558-60). The EU moved quickly, having engaged cautiously with Libya throughout the 1990s (Zoubir, 2009b). The US moved more slowly to normalise relations (Zoubir, 2006). Following the 9/11 attacks, the focus of US security 'concentrated ever more on the Maghreb, and a continuation of sanctions and the bellicosity of the Bush Administration provided leverage that saw Qaddafi abandon' his weapons programmes (Kenealy 2012b, p. 558; see Zoubir, 2009a, p. 995; Zoubir, 2006, pp. 63-5).

The UK government was closely involved with this rapprochement. From 2000 various contacts at official level took place to prepare the ground for the lifting of sanctions on Libya and the commercial opportunities that would follow (Merrick, 2009). Blair visited Libya in March 2004 confirming, in a symbolic move, Gaddafi's non-pariah status. In May 2007 Blair met with Gaddafi in Libya and oversaw the signing of two important documents. The first was a Memorandum of Understanding (MoU) between the two governments that committed, amongst other things, to signing a Prisoner Transfer Agreement (PTA) within the next 12 months. The MoU covered various legal and judicial areas and, as MacAskill (*TLB*, p. 166) puts it, seemed on the surface to be 'innocuous'. The second was an Exploration and Production Sharing Agreement (EPSA) between the Libyan government and BP, the oil company, worth around \$900 million that had significant implications for UK

energy policy. It was the revelation of the UK-Libya MoU that first brought MacAskill and his colleagues in the Scottish government into the drama in June 2007.

To summarise: By the time that MacAskill entered the drama in mid-2007 the UK government had established, as an aim of foreign and trade policy, to both continue the efforts to bring Libya back into the international fold and to support British companies seeking commercial access to, and concessions from, Libya. The US government broadly supported this aim as Libya fit into its approach to the Global War on Terror in the years after 9/11. Gaddafi, pleased with the progress that he had made, was determined to secure the release of Al-Megrahi, whose innocence the Libyan government continued to claim. Libyan officials saw signing a PTA with the UK as the first step towards that goal. As for Al-Megrahi, in mid-2007 he was imprisoned but the SCCRC had offered him the chance of a further appeal of his conviction.

### ***3. The Lockerbie Bombing: The Search for Justice***

MacAskill spends a large part of the book considering the events leading up to mid-2007. It is not until page 156 that he writes: 'This, then, is my story of the Lockerbie bombing'. Pages 156 to 272 detail the events in which he was directly involved before offering a condemnation of Western policy towards Libya and his theory of who was behind the bombing. The context is necessary for any reader to fully understand the events that MacAskill describes first hand. What is disappointing is that these opening 156 pages add so little to what we already know about the Lockerbie bombing, investigation, trial and appeals.

MacAskill sets out his thesis early on:

[The book] shows that the trial and the subsequent legal wranglings were in some ways a side issue to major international, commercial and security deals ... I knew at the time that Scotland was just a small cog in a big wheel, but what I did not realise then was just *how* small and *how* big (TLB, p. 8).

That is nothing particularly new. Press reports, long read journalistic pieces, academic articles, and books by participants have detailed those realities. To be fair,



the book does represent the first attempt to bring the threads together, from the events leading to the bombing on 21 December 1988 through to the release of Al-Megrahi on 20 August 2008 and the subsequent fallout.

In terms of the 'big wheel' thesis, MacAskill advances two key arguments: the first pertains to the bombing itself; the second to the web of interests and negotiations that surrounded the 2007-2009 period. It has long been suggested that Libya was not solely responsible for Lockerbie. MacAskill puts the various pieces of the puzzle together and suggests that the bombing was an effort that involved and implicated not just Libya but also Iran, the Popular Front for the Liberation of Palestine General Command (PFLP-GC), and Syrian intelligence. MacAskill contends that the origins of Lockerbie lie in the Iranian government's decision to offer \$10 million 'to bring down an American airliner' as revenge for the shooting down of an Iranian passenger aircraft by the USS Vincennes – a US navy cruiser – on 3 July 1988 (*TLB*, p. 303). Iran 'put up the money' but it was the PFLP-CG that 'had the capacity and the will to do it' (*TLB*, p. 303). MacAskill explains how the PFLP-CG had previously worked with Syrian and Libyan intelligence and contends that both intelligence agencies once again supported the group in the Lockerbie bombing. The PFLP-CG 'needed assistance ... That call for help was answered by the Libyans, who already knew of the plans. They were already involved [with the PFLP-GC] in the supply of timers and other support. The Libyans picked it up from there' (*TLB*, p. 303). This threading together of Iran, the PFLP-GC, Syria and Libya is interesting. The major problem is that the section is so thinly referenced because there is a lack of hard evidence to support it. This is not speculation about political motivation, where the problem of a lack of evidence is common. It is speculation about who commissioned a terrorist attack, who made bombs and procured timers, and who delivered them.

And within all of this, what was the role of Al-Megrahi? MacAskill offers his opinion that, whilst involved in the Lockerbie plot, Al-Megrahi did not acquire the clothes in Malta (*TLB*, p. 305) and, whilst he likely took the suitcase with the bomb in it to the airport in Malta, 'it was Fhimah would get it airside and beyond security' (*TLB*, p. 312). This is, to say the least, a remarkable admission to make given that Al-Megrahi's guilty verdict was so heavily based on the notion that he was the

purchaser of the clothes, a point quickly pointed out by John Ashton, who worked on Al-Megrahi's legal team (Ashton, 2016).

The second web is the web that surrounded the release of Al-Megrahi. It is here that MacAskill criticises the broader foreign policy agenda that saw various Western countries and companies rushing to cut deals, do business, and secure concessions and contracts in Libya, usually having to deal with Gaddafi's officials as part of that process. As with his recapping of the bombing and the trial there is little new in this content. It is, by now, well established that BP lobbied the UK government to help them progress their exploration deal in Libya. And it is also well established that the UK government did various deals with the Gaddafi regime, including facilitating and supporting arms sales. Drawing on evidence from Human Rights Watch and Amnesty International, MacAskill is particularly strong in his critique of the record of the Blair administration, its closeness to the Bush administration, and the overarching agenda of the rapprochement with Gaddafi (*TLB*, pp. 289-99).

Whilst some of the darkest aspects of the UK-Libya relationship during these years are hard or even impossible to defend (although the facts cannot be fully appraised until the release of government documents, including those of the intelligence and security services) – such as MI6's complicity in renditioning dissidents back to Libya to face punishment at the hands of the Gaddafi regime – MacAskill's treatment of the international politics surrounding Libya's rehabilitation is one-dimensional. He is clearly no fan of the 'deal with the devil' (*TLB*, p. 288) but never does he step back and offer a serious, realistic critique of UK-US policy towards Libya. What would he have done if he had been charged with making foreign policy choices? This is particularly disappointing given that MacAskill himself criticises, rightly in my opinion, opposition politicians in Scotland who condemned and criticised his decision to release Al-Megrahi without ever really explaining how they might have approached the decision. It is easy to criticise, and particularly when your targets are the much-maligned duo of Blair and Bush. It is far harder to explain what an alternative and realistic policy might have been.

Would it have been better to leave Libya isolated and cut off from international society? In the aftermath of 9/11, as Gaddafi made approaches to abandon his weapons programme and cooperate with Western intelligence agencies, should the

US and the UK have declined, and at what cost? Once sanctions against Libya had eased and once companies began to secure inroads into the Libyan economy, should the UK government have stood back on point of principle, allowing others to reap rewards whilst British companies missed out? Is it not a legitimate job of government to try and support key industries as they seek to break into challenging international markets? These are just some interesting and tough questions that UK foreign policy towards Libya in the early 2000s throws up. MacAskill barely engages with them, content instead to offer an all-too-easy condemnation of Tony Blair.

If MacAskill's take on international politics in the early 2000s and his attempt to assemble the pieces of the puzzle that is Lockerbie leave something to be desired, what about his insights about those events that he was most closely involved with? It is to those events that I now turn my attention.

#### **4. The UK, Scotland, and Libya: A Case Study in IGR**

In early June 2007, just weeks after entering office, SNP government ministers became aware of the MoU that the UK government signed with Libya on 30 May 2007. The MoU covered mutual legal assistance in criminal, civil and commercial law, and also extradition and prisoner transfer through a to-be-negotiated PTA (FCO, 2007). MacAskill rightly frames the MoU in the context of the UK's system of intergovernmental relations (IGR), arguing that although signing the MoU was a legitimate action within the realm of UK foreign policy it 'opened up the possibility of returning' Al-Megrahi to Libya and that in proceeding with the MoU, the UK government had 'ignored the interests of the Scottish government' (*TLB*, pp. 167-68).

MacAskill cuts right to the heart of the issue. The UK's devolution settlement creates areas where a policy decision may pit a reserved UK-wide interest against a devolved interest. In this case signing a PTA with Libya – an act of foreign policy by the UK government – would trigger an application to transfer Al-Megrahi back to Libya to complete his sentence, an application that the Scottish government would have to deal with. With situations such as these in mind, UK officials designed a system of concordats to manage devolution and to help smooth IGR. They were

designed to ensure: ‘full communication and consultation between the administrations on matters of joint interest’; ‘co-operation between administrations in all stages of the development of policies for which each had competence’; ‘a full exchange of information between the administrations on all relevant policy-related matters’; and ‘confidentiality of information’ passed between governments (Scott, 2001, p. 28; see UK Government 2001, paras. 4-11). The concordats were intended to apply to international relations as well, in recognition of the fact that the conduct of foreign policy by the UK government could generate unintended consequences for the devolved administrations (see Kenealy, 2012a, pp. 63-70 for a fuller discussion). They have been criticised for institutionalising the power of the UK government vis-à-vis the devolved administrations but, short of shifting IGR into a legal realm of courts and judicial panels, it is hard to see how you banish the reality of power asymmetry.

Once the MoU came to light Alex Salmond, then First Minister, wrote to Blair to complain that Scottish ministers had not been consulted as per the letter and spirit of the concordats. It was impossible to deny that a potential future PTA with Libya would have significant implications for Scotland given the presence of Al-Megrahi in a Scottish prison. In a letter to Blair, Salmond accepted that ‘while there is not strict legal requirement for that consultation, it is surely a matter not just of courtesy but of good government that such consultation should have taken place’.<sup>8</sup> In a subsequent letter Salmond grounded his complaint specifically in the language of the concordats.<sup>9</sup>

Lord Falconer, at the time the Lord Chancellor in the UK government, defended the failure to consult with Scottish ministers on the grounds that the MoU was just the first step of a process of negotiation and ‘does not commit the Scottish Executive [as it was formally called at the time] or indeed the UK Government to anything specific’.<sup>10</sup> Jack Straw, Falconer’s successor as Lord Chancellor and a key player in subsequent developments, reiterated this distinction between the MoU as a ‘broad

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<sup>8</sup> Letter from Rt Hon Alex Salmond to Rt Hon Tony Blair, ‘Memorandum of Understanding – Libya’, 7 June 2007, SG.

<sup>9</sup> Letter from Rt Hon Alex Salmond to Rt Hon Tony Blair, ‘Memorandum of Understanding – Libya’, 13 June 2007, SG.

<sup>10</sup> Letter from Rt Hon Lord Falconer to Rt Hon Alex Salmond, ‘Memorandum of Understanding – Libya’, 12 June 2007, *MoJ*.

outline' of 'the aspirations you wish to achieve' and the PTA which involved getting 'down to the detail' (House of Commons, 2010, qq. 153, 155).

MacAskill is right, IGR did not function well during these early stages of the process (*TLB*, p. 168-69). Although the concordats are said to be binding in honour only, the UK government failed to communicate and consult fully, to co-operate in these early stages of policy development, and to fully exchange information in the spirit of no surprises (Kenealy, 2012a, pp. 70-73). It is also important to note that this failure cannot be attributed to any desire, on the part of the UK government, to withhold information about UK foreign policy from an SNP government. The UK was discussing the MoU with Libya for some time before the SNP's victory in the 2007 Scottish Parliament elections. As such it was the Labour First Minister Jack McConnell that UK ministers were keeping in the dark. McConnell was quick to criticise UK ministers for this once news of the MoU became public (*BBC*, 2007). The most intelligible way to read the UK government's decision to progress the MoU with consulting Scottish ministers is that they wished to set a process in train, a process that would begin to generate its own momentum, before Scottish ministers could begin to publicly challenge them.

From that point on, however, IGR were better. There were three decisions taken between 2007 and 2009 that involved IGR. The first two were decisions of the UK government: the first to sign the MoU (discussed above and a failure of IGR) and the second to sign the PTA. The third decision was by the Scottish government, to decline the request to transfer Al-Megrahi. IGR did not perform equally badly across these three decisions although in none of the three cases can they be said to be exemplary.

The decision by the UK government to sign the PTA on 17 November 2008, without any specific provision excluding Al-Megrahi, was the culmination of a three-cornered negotiation in which UK officials shuttled backward and forward trying to accommodate the interests of the Libyan and Scottish governments. MacAskill is highly critical of this decision, complaining that the UK government reneged on commitments to Scotland to ensure that the PTA would not cover Al-Megrahi or anybody convicted in connection with Lockerbie (*TLB*, pp. 170-80). Jack Straw did write to MacAskill explaining that the preference of the UK government was for Al-

Megrahi to be excluded from the terms of the PTA and officials from the UK's Ministry of Justice negotiated with that aim in mind.<sup>11</sup> Straw stressed to MacAskill that he would instruct his officials to attempt to amend the PTA, making it 'clear to the Libyan authorities that without this addition it will not be possible to conclude' a PTA.<sup>12</sup>

It was at this stage that the national interest of the UK government – to pursue its rapprochement with Libya and to reap a share of the benefits of any opening up of Libya economically – came into direct conflict with the commitment given to the Scottish government to exclude Al-Megrahi from the PTA. During the closing months of 2007 the Libyan officials negotiating the PTA made it clear that they would not sign a PTA that excluded Al-Megrahi and, furthermore, that they would not ratify BP's exploration deal unless a standard PTA was agreed.<sup>13</sup> This was hardly surprising given the interest of Gaddafi in securing Al-Megrahi's release. At this point, BP lobbied the UK government to help them, fearing significant losses from the delay or possible cancellation of their exploration deal.<sup>14</sup>

Throughout the negotiation of the PTA the dialogue and information sharing between the UK government and the Scottish government was far better than it had been surrounding the MoU. The Scottish government did not secure the outcome that it wanted. But the decision for UK ministers was clear. Defend the Scottish government preference and risk losing a major contract for BP and compromising the ongoing development of the UK-Libya relationship. Or sign a standard PTA, with no exclusions, with the knowledge that Scottish ministers still had the power to decide whether or not to transfer Al-Megrahi. MacAskill claims that the decision of the UK government 'was the equivalent of delivering the black spot to the Scottish government and, indeed, its people' (*TLB*, p. 179). Dramatic writing aside, the

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<sup>11</sup> Letter from Rt Hon Jack Straw to Kenny MacAskill, 26 July 2007, *MoJ*; Briefing for Secretary of State for Justice on UK/Libya Prisoner Transfer Agreement negotiations, 19 September 2007, *CO*.

<sup>12</sup> Letter from Rt Hon Jack Straw to Kenny MacAskill, 23 September 2007, *MoJ*.

<sup>13</sup> Note from UK Ambassador in Tripoli to the Foreign Office, 2 October 2007, *CO*.

<sup>14</sup> Record of meeting between Simon McDonald, Prime Minister's foreign policy adviser, and Sir Mark Allen, BP adviser, 19 November 2007, *CO*.

decision by the UK government was made in the national interest and a submission to Jack Straw on 7 November 2007 sets out the balance of interests.<sup>15</sup>

The biggest criticism that could be levelled against the decision was not that the UK government failed to allow Scottish ministers a veto over UK foreign policy but rather that UK ministers seemed to be adopting an incredibly short-term, kick-the-can-down-the-road approach to their bilateral relationship with Libya. Signing the PTA, as the Libyans requested, might have given some short-term respite. Indeed BP's exploration deal was ratified just days after the PTA was signed. However, if Scottish ministers had refused to transfer Al-Megrahi down the line, and if the possibility of compassionate release had not emerged, then the Libyan government would certainly have tried to make more trouble later in the process. The most interesting aspect of these negotiations is what they tell us about the 'muddling through' nature of UK foreign policy.

The third decision that implicated IGR was MacAskill's decision to decline the transfer request. Once the PTA was ratified in April 2009 the Libyan government was quick to submit a transfer request on Al-Megrahi's behalf. MacAskill offers some interesting insights into the meetings and discussions that he and his officials had with Libyan, UK and US officials during their consideration of the transfer request (*TLB*, pp. 186-209). Complicating MacAskill's task in considering it was the August 1998 letter stating that Al-Megrahi would serve his sentence in the UK. Did this constitute a bar to transferring him? In the course of trying to answer this question MacAskill was informed by Eric Holder – the US Attorney General in 2009 and the Deputy Attorney General in 1998 – that the understanding was clear in 1998, Al-Megrahi would serve the sentence in the UK (*TLB*, p. 193). Hillary Clinton reiterated this to MacAskill over the telephone (*TLB*, p. 215). As an aside, the description of MacAskill's phone call with Hillary Clinton – whilst he was going through security and boarding at an airport on Orkney whilst she was on Air Force Two flying from Nigeria to Liberia – is a rare moment of personal colour in the book (*TLB*, pp. 214-16). MacAskill sought to get confirmation, either way, from the Foreign Office about their view of the 1998 letter and what it meant for the decision.

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<sup>15</sup> Memorandum for Secretary of State for Justice, 'Prisoner Transfer negotiations with Libya', 7 November 2007, *CO*.

MacAskill is critical of the Foreign Office response. He labels a letter received from the FCO on 3 July 2009 as 'cursory' and lacking 'any supporting documentation' (*TLB*, p. 192).<sup>16</sup> Nearly a month elapsed between MacAskill's second request for information – this time directly to the then Foreign Secretary David Miliband – and a response from Foreign Office minister Ivan Lewis. Lewis' response was 'short and succinct but totally lacking any detail or information ... though it did make clear the UK government's desire for Megrahi's release' (*TLB*, p. 196). The version of the letter in the public domain does no such thing. In fact it says this: 'My officials ... were not making representations on whether Mr Megrahi ought to be transferred to Libya'.<sup>17</sup> What Lewis did say was that neither government – UK or US – entered into a legal commitment that would prevent a bar to transfer.

MacAskill points out that was not his question in his letter.<sup>18</sup> He wanted to understand the nature of any political commitments made in 1998. The private Foreign Office view of this request was, to put it bluntly, that it was none of his business.<sup>19</sup> They were responsible for handling the UK-US bilateral relationship and they had carefully considered the implications of the 1998 letter in a briefing note prepared for Ivan Lewis and officials.<sup>20</sup> MacAskill's task, in their mind, was to consider the transfer on legal grounds. If there was any diplomatic fall out that was for them to handle, not the Scottish government. Internal memorandums from the Foreign Office do suggest a calculated effort not to weigh the Scottish government down with too much information about the foreign policy implications of Al-Megrahi for fear of irritating Scottish ministers. As Gus O'Donnell confirmed in his review of papers (UK Government, 2011, p. 11), 'there is no record of any formal or informal articulation of HMG's [UK Government's] underlying view to Scottish Ministers'. The tone of the Foreign Office could certainly have been better and they might have

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<sup>16</sup> Letter from Foreign Office North Africa Team to W. George Burgess (Scottish Government), 'Application for the transfer of Abdelbaset Al-Megrahi', 3 July 2009, *FCO*.

<sup>17</sup> Letter from Ivan Lewis to Kenny MacAskill, 'Application for the transfer of Abdelbaset Al-Megrahi', 3 August 2009, *FCO*.

<sup>18</sup> Letter from Kenny MacAskill to Rt Hon David Miliband, 'Application for the transfer of Abdelbaset al-Megrahi', 16 July 2009, *SG*.

<sup>19</sup> Private conversation with Foreign Office official.

<sup>20</sup> Foreign Office memorandum, 'Lockerbie/Megrahi: Legal advice to the Scottish Executive', 29 June 2009, *CO*.



contextualised their understanding of the 1998 letter more clearly for MacAskill and his officials. But an egregious violation of IGR this was not.

Ultimately, MacAskill rejected the application to transfer Al-Megrahi and, in his statement on 20 August 2009, cited his belief that the families of the victims, especially the American families, had been led to believe that ‘there would be no be prisoner transfer and the sentence would be served in Scotland’ (Scottish Government, 2009). However, by that point, a different path by which Al-Megrahi might get out of his Scottish prison had emerged: compassionate release.

## **5. Compassionate Release and Para-Diplomacy**

The possibility of releasing Al-Megrahi on compassionate grounds appeared on the horizon in early September 2008 when he was diagnosed with terminal prostate cancer. MacAskill was informed by the Chief Executive of the Scottish Prison Service and ‘passed the news on to Alex Salmond’s senior special adviser in an aside at a Cabinet meeting’ (*TLB*, p. 180). This brief remark by MacAskill is revealing, understandably, of the saliency of the issue at the most senior levels of the government. The situation was being watched carefully. It is when discussing the application for compassionate release, and his ultimate decision to release Al-Megrahi, that MacAskill’s book falls shortest.

Throughout the book MacAskill makes it clear that he was operating in a complex, high stakes environment with political considerations swirling. He details being caught between the interests of the UK, Libya, and the US and of being aware of all manner of potential political fallouts on all sides (*TLB*, p. 218-19). He maintains, as of course he must, that he took the decision in a quasi-judicial way, more akin to a judge than a politician. The broader political context was, he claims, not a factor. To say that beggars belief is no indictment of MacAskill. Rather it is an indictment of the fanciful notion that human beings who have ascended to the top of politics can suddenly flick a switch, move into a vacuum, and take a decision in a detached and legalistic way. It is part of a broader shift towards the idea that we can de-politicise or technocratise processes and decisions that are shot through with politics.

Following Al-Megrahi's diagnosis, Libyan officials moved quickly to make it clear that his death in custody would have severely negative ramifications for the UK-Libya relationship.<sup>21</sup> Throughout late 2008 and early 2009 the UK government grew increasingly concerned about the implications for the bilateral relationship and agreed to 'facilitate an appeal by the Libyans to the Scottish government for Mr Megrahi's transfer under the PTA or release on compassionate grounds' (UK Government, 2011, pp. 9-10). The US made it clear to Alex Salmond in August 2009, via official diplomatic channels, that they opposed transferring Al-Megrahi and that if he had to be released on compassionate grounds they would prefer than he be released to a secure residence in Scotland, something MacAskill has discounted on logistical grounds.<sup>22</sup> MacAskill was caught between the interests of three governments. And hanging over it all was the knowledge that Libyan regime had a track record of engaging in retaliatory measures against countries that displeased it.

One of the most telling moments in the book comes when MacAskill writes:

Just a few weeks before, UK hostages taken prisoner in Iraq had been murdered. That had followed the execution prior to that of other Western nationals captured in the area. There was hostility to the West and ordinary citizens were becoming targets. Most in North Africa or the wider Arab world neither knew of Scotland nor cared about it ... The last thing I wanted was to have Scotland become a place that was demonised and its citizens targeted. I would not allow Scottish oil workers or others, wherever they might be, to face retribution as a consequence of my decision (*TLB*, p. 170).

The words resonate because they reveal MacAskill to be a human being making a tough decision in an environment where such serious issues as potential retaliation against Scottish citizens had to be considered. Some of the government papers that have been released to date remain redacted but it seems plausible that some

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<sup>21</sup> Record meeting between Libyan government officials and Scottish government officials, 27 October 2008, SG.

<sup>22</sup> Memorandum from U.S. Charge d'Affairs to Alex Salmond, 12 August 2009, SG.

tangible and credible threats might have been on the minds of Scottish ministers during these months.

The way was cleared for MacAskill to make a decision on compassionate grounds when he received a report on 10 August 2009 that suggested Al-Megrahi's prognosis may be as little as three months, the length of time usually acknowledged as qualifying someone for such a release.<sup>23</sup> Whilst questions remain about the veracity of the medical evidence used and the balance of opinion between cancer specialists and general practitioners (see Menendez et al., 2010, pp. 23-32), MacAskill was now in possession of the report that gave him the grounds he needed to release Al-Megrahi on 20 August 2009.

Two of the most interesting meetings in this whole process took place in August 2009. MacAskill was present at both and they each receive little more than a paragraph of text in a 325-page book. The first meeting was MacAskill's meeting with Al-Megrahi at Greenock prison. This meeting was roundly criticised as improper by many MSPs at the time (Scottish Parliament 2009a; 2009b). MacAskill defends it (*TLB*, pp. 204-6), reasonably, on the grounds of practicality (it made little sense to haul Al-Megrahi to a government office given his security) and legitimacy (because Libyan officials submitted the applications on Al-Megrahi's behalf, MacAskill had to allow the man to make representations). Opposition MSPs argued that the representations could have been made in writing, via Al-Megrahi's legal team, and insinuated that some form of deal might have been struck at the meeting. No evidence of any such deal exists although Al-Megrahi himself has claimed that MacAskill had a Libyan official relay to him that it would be easier to grant compassionate release if he dropped his outstanding appeals (see Ashton, 2012). No evidence has emerged to substantiate this claim. It is, nevertheless, disappointing that the meeting is described so briefly in the book.

It is also disappointing that MacAskill offers no real explanation for why both decisions were announced at the same time. Al-Megrahi dropped his outstanding appeals two days before 20 August. Let us assume that he did so simply to hedge his bets and ensure that both his applications – for transfer and for compassionate

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<sup>23</sup> See note 3.

release – had a chance of succeeding (no transfer could be granted so long as there were outstanding appeals). MacAskill has given, as his reason for rejecting the transfer request, the commitments in the August 1998 UK-US letter. He was in possession of all the information he was going to get on that front by 6 August when the letter arrived from the Foreign Office. He received the medical report with the three-month prognosis on 10 August. The sequencing and timing are certainly tight but if there is any truth to the notion that Scottish ministers wanted Al-Megrahi's appeals to be dropped then events proceeded in the best way possible to achieve that end.

The second meeting of interest was on the Friday before Al-Megrahi's release and involved MacAskill, Salmond, Nicola Sturgeon (then the Deputy First Minister) and 'the First Minister's senior special adviser' (*TLB*, p. 227). The meeting was

[P]olitical rather than governmental ... There was no opposition to my decision, simply suggestions about timing and handling. They were going to have to deal with the fallout and consequences for the government and party. It was agreed to keep in touch and further calls took place over the weekend as the press speculation reached even new heights, but nothing changed my direction of thought (*Ibid.*).

This meeting, no doubt crucial in terms of the presentation and framing of the decision, is another one that is glossed over quickly. Yet the way in which the Scottish government framed and presented the compassionate release is one of the most fascinating aspects of the history of Lockerbie. It is unlikely that many records exist of discussions that would have taken place at these most senior political levels. For those who, Geoffrey Elton-like, seek a history of empirically verifiable facts, the notion that the Scottish government found a way to make the best of a bad situation by turning the release of Al-Megrahi into an opportunity will be beyond the scope of inquiry. But the decision to release Al-Megrahi compassionately and, crucially, the way that decision was presented and the language used can be understood as a case of political para-diplomacy (Kenealy, 2012b).

Para-diplomacy is a concept that has emerged in academia to try to make sense of the external affairs activities of sub-national governments. Over the past 20-or-so years a cottage industry has emerged at the interface of Comparative Politics and International Relations seeking to explain the phenomenon (see Aldecoa and Keating, 1999). Scholars of para-diplomacy most often focus on economic and cultural activities by sub-national governments, such as trade missions, sporting events, tourism, and national heritage. However, it is also possible to engage in political para-diplomacy. In the case of the SNP, who seek independence for Scotland, political para-diplomacy would involve taking advantage of opportunities to act internationally so as 'to demonstrate, and project the image' of a Scotland 'with its own set of values, laws, and customs, and possessing an ability to operate autonomously on the international stage' (Kenealy, 2012b, p. 556). In the weeks and months following the release, Salmond and other leading SNP figures were able to repeatedly advance the argument that the decision was 'Scottish' and reflected something distinctive about Scotland and its notion of justice, contrasting the purity of Scottish compassion with the alleged underhand dealings of the UK government (*Ibid.*, pp. 569-71)

Putting oneself in the shoes of Scottish ministers in August 2009 there were a series of possibilities open to them:

1. Transfer Al-Megrahi to Libya. All appeals would have to be dropped, sparing Scottish justice a further round of potentially embarrassing headlines; UK foreign policy ends are not compromised; and no risk of Libyan retaliation. But: Gaddafi might not lock Al-Megrahi up, or might lock him up 'in luxury' creating outcry; US officials would cry foul and vehemently criticise Scottish ministers for the transfer; and the decision could not be presented as distinctively Scottish wrapped up as it would be with the UK-Libya PTA.
2. Release Al-Megrahi on compassionate grounds and reject the transfer agreement as late as possible. The possibility of further appeals and Scottish justice in the headlines goes away; the decision can be packaged and presented as distinctively Scottish, based on Scottish values and notions of justice and mercy, contrasted with UK's shadier dealings. But: runs the risk of

looking soft on terrorism and might hand a tactical advantage to political opponents.

3. Refuse to transfer or release Al-Megrahi on compassionate grounds. The Scottish government could claim to be holding the line against an aggressive Libyan regime and refusing to be blackmailed by a threatening state. But: potential for Libyan retaliation and negative headlines implicating Scottish ministers and their naivety in the realm of foreign policy; Scottish government would be cutting across stated UK foreign policy objectives potentially triggering a serious constitutional debate about the operation of devolution.

Nothing in the documents published to date suggests that the Scottish government, or MacAskill himself, made the decision with these calculations in mind. But to seek that standard is to return to a political history that admits no interpretation that cannot be empirically verified by a documentary source. But the task of the political historian is to try and reconstruct the decision dynamics. Others might reasonably look at the above options in a slightly different way. Of the options on the table the one that the Scottish government were most able to control, the one that they were most able to paint as distinctively 'Scottish', and the one that closed the door to an ongoing appeal, was the one that emerged.

## **7. Conclusion**

Churchill apparently once said, 'history will be kind to me, for I intend to write it'. In the case of the decision to release Al-Megrahi, MacAskill is the first person involved in the process to put pen to paper extensively. What he has presented is a book that is ultimately unsatisfying. As a critique of the West's policy towards Libya during the 1990s and 2000s it is shallow and opts for the easy critique. As an attempt to play the role of detective surrounding the Lockerbie bombing it pieces together an explanation that is plausible but not new. And as an insight into the events of 2007-2009, events that MacAskill was a part of, it adds very little to the existing record. The world that MacAskill creates is one in which he and his SNP colleagues are the

only pure politicians in a world of reprehensible dirty dealers, from Blair to Bush and beyond. Whilst it is in the interests of all (ex)-politicians to preserve their legacy there is a balance to be struck between respectability and insight. In seeking to preserve the former, MacAskill has fallen short on the latter.

More remains to be written about Lockerbie. Whilst some documents have been released, and they are useful, others remain classified. Papers on the UK government's approach to Libya will begin to emerge in a few years as a result of the shift from the 30-year rule to a 20-year rule. Scottish government papers from 2007-2009 should start to appear from 2022. US documents will come even later. For those interested in the events surrounding Lockerbie – from the bombing to the release of Al-Megrahi – there will be more paper trails to follow. As time passes and more of the participants retire or die it may be possible for more candid research interviews to be undertaken. Perhaps there might even be a few more memoirs. And with an appeal ongoing, one thing is certain: Lockerbie is not going away any time soon.

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**Table 1.** Timeline of key events

Date	Event
April 1984	UK breaks diplomatic relations with Libya following the murder of WPC Yvonne Fletcher outside of Libyan embassy in London
21 December 1988	Pam-Am flight 103 blown up over Lockerbie
13 November 1991	Indictments issued against Megrahi and Lamin Fhimah
August 1998	US and UK governments put forward joint proposal to UN Security Council for trial of Megrahi and Fhimah; joint UK-US letter of states that 'If found guilty, the two accused will serve their sentence in the United Kingdom'
7 July 1999	UK re-establishes diplomatic relations with Libya after Gaddafi accepts general responsibility for murder of WPC Fletcher in 1984 and agrees to work with investigation into the bombing of Pan-Am flight 103
3 May 2000	Trail begins at Camp Zeist, Netherlands under Scots law
31 January 2001	Megrahi found guilty and Fhimah not guilty; Megrahi launches appeal
14 March 2002	Megrahi's appeal rejected; he begins term at Barlinnie prison on 16 March
August 2003	Libyan government agrees to pay compensation to families of Lockerbie victims; UK introduces UN resolution to lift sanctions
23 September 2003	Scottish Criminal Case Review Commission (SCCRC) begins review of Megrahi's case
24 November 2003	Megrahi's jail time set at a minimum of 27 years
19 December 2003	Libya agrees to give up WMD programme and limit ballistic missile programmes in agreement brokered by UK and US
30 May 2007	Tony Blair visits Libya and signs MoU committing to negotiating a Prisoner Transfer Agreement (PTA); Exploration and Production Sharing Agreement (ESPA) signed between BP and Libyan government, subject to subsequent ratification
June 2007	Scottish Government repeatedly makes clear to UK government their opposition to a PTA being signed with Libya
28 June 2007	SCCRC refers Megrahi's case to the Court of Criminal Appeal
22 June 2007	Lord Falconer – then UK Lord Chancellor – tells Scottish Government that the scope of the PTA would exclude Megrahi
26 July 2007	Jack Straw – the new UK Lord Chancellor – confirms with Scottish Government that he seeks to exclude Megrahi from the PTA
Sep-Oct 2007	Libyan officials make it clear to UK government that they oppose any exclusion of Megrahi in the PTA and link signature of PTA to progress of BP exploration deal signed on 30 May
Oct-Nov 2007	BP lobby UK government for progress on the exploration deal

11 October 2007	Beginning of appeal process at the Appeal Court in Edinburgh
2 November 2007	Jack Straw clarifies situation with MacAskill, explaining Libyan objections to a PTA that excludes Megrahi and the commercial interests at stake
19 December 2007	Jack Straw informs MacAskill that PTA will not explicitly exclude Megrahi
23 December 2007	Libya ratifies the exploration agreement with BP
September 2008	UK government nears completion of PTA agreement with Libya; Megrahi diagnosed with advanced-stage prostate cancer
9 October 2008	Libyan government writes to UK ministers that Megrahi must be released before he dies; UK ministers explain the process of compassionate release to Libyan government officials by letter
17 October 2008	After discussions with Scottish Government, Bill Rammell – a UK foreign office minister – writes to Libyan government explaining compassionate release; Gordon Brown and US government officials are briefed
21 October 2008	Megrahi's advanced-stage prostate cancer is made public
27 October 2008	First meeting between Libyan officials and Scottish Government officials, attended by UK foreign office officials; Libyans state that Megrahi's death in custody would have serious implications for UK-Libya relationship
7 November 2008	Jack Straw informs Alex Salmond that the PTA will be signed on 17 November
December 2008	Scottish Government submits a request to the FCO asking about the foreign policy implications of al-Megrahi
15 December 2008	UK foreign office writes to Scottish Government re: foreign policy implications of Megrahi situation
February 2009	Bill Rammell tells the Libyans that pressure on the Scottish Government from the UK government would be inappropriate, could be subject to judicial review, and would likely be counterproductive
27 April 2009	Megrahi's second appeal begins
29 April 2009	The UK-Libya PTA comes into force
5 May 2009	Libyan government files formal application for the transfer of Megrahi, under the PTA, with the Scottish Government
22 June 2009	Scottish Government asks for Foreign Office view on whether the 1998 joint UK-US letter to the UN involved a legal commitment that Megrahi would serve his sentence in the UK; Foreign Office replies on 3 July stating that they see no legal bar to Megrahi's transfer to Libya
6 July 2009	Scottish Government writes again to Foreign Office for details on the 1998 joint letter; reply is received on 3 August reiterating that the UK government sees no legal bar to Megrahi's transfer to Libya
10 July 2009	Gordon Brown meets with Gaddafi and tells him decisions about Megrahi

	are for Scottish ministers alone
24 July 2009	Libyan government submits application for compassionate release, concurrent to the application under the PTA
6 August 2009	MacAskill meets with Megrahi at Greenock prison to discuss the transfer application
12 August 2009	US Charge d’Affaires writes to Alex Salmond setting out opposition to Megrahi’s transfer or compassionate release
18 August 2009	Megrahi drops his appeal
19 August 2009	Kenny MacAskill decides to reject the application under the PTA; he then approves Megrahi’s application for compassionate release
20 August 2009	Megrahi returned to Libya
2 September 2009	Scottish Parliament debates MacAskill’s decision and votes 73-50 that MacAskill mishandled the decision and damaged Scotland’s reputation
12 October 2009	David Miliband, the UK Foreign Secretary, makes oral statement to the House of Commons
5 February 2010	Scottish Parliament Justice Committee publishes report into the decision to release Megrahi, following a four month inquiry
20 July 2010	David Cameron orders inquiry into the decision, led by Sir Gus O’Donnell – then Cabinet Secretary – that reports on 7 February 2011
20 May 2012	Megrahi dies in Tripoli